Introduction

The issue of inheritance is of fundamental importance. If it is applied correctly all heirs receive their just and legitimate shares resulting in clean-heartedness, happiness and *barkat* (blessings). If it is not applied at all or not correctly, bitterness, hatred, in fighting and loss of *barkat* prevails forever.

This branch of Islamic Law is so important that it has been given its own status. Rasulullah salllahu alaihi wasallam says: "Learn the laws of inheritance and teach it to people, for it is half of knowledge".

The laws of inheritance have probably been referred to as half of knowledge because it has to do with the correct distribution of the wealth of a deceased person and money associated with all forms of worship, directly or indirectly, in fact with our very existence, if this is *halaal*, our food, clothing, shelter, transport, etc will be *halaal* and our *ibaadat* will be in a position to be accepted. If this is not *halaal,* all our *ibaadat*, etc. is rejected by Allah. Therefore, together with it being half of knowledge and being studied as a subject of its own and having its own independent status, it is linked to all *ibaadat* as well.

If one is righteous and keeps his financial matters clean, the *barakah* of his wealth is enjoyed by generations after him. The Koran relates the event of Khidhar alaihis salaam putting a wall right on the objection of Moosa alaihis salaam that the people of that town did not host them. Khidhar alaihis salaam should not have served them especially without remuneration. Khidhar alaihis salaam explained that the inheritance of some orphans was buried there and had to be protected because their parents were righteous.

Will or *Wasiyat*

The word *wasiyat* also means a moral exhortation; in our context it means a declaration in compliance with moral duty of every Mussalman to make arrangements for the distribution of property. Thus the Muslim law of wills present a compromise between two opposite tendencies- namely, one, not to disturb or interfere with the divine law of distribution of property after death, and two, the supposed moral duty of every Muslim to make arrangements for the distribution of his property within the prescribed limits. According to Fyzee the Muhammadan sentiment is in most cases opposed to the disposition of property by will, and yet it is a moral exhortation, it is thus a reconciliation between the dual insistence on moral exhortation as well as legal rectitude.

The will of a Muslim is governed in India subjected to the provisions of the Indian Succession Act, 1925, by the Muhammadan law.

Definition

- Will is an assignment of property to take effect after one's death.[1]
- Wasiyat means an endowment with the property of anything after death- as if one person should say to another, ' give the article of mine', after my death, to a particular person.[2]
- The legal declaration of the intentions of a Muslim with respect to his property, which he desires to be carried into effect after his death.[3]

[1] *Durrul Mukhtar,* 402 (1st edn., 1913)
[2] *Hedaya,*690.
[3] Based on the definition given in the Indian Succession Act, s. 2.

Concept and meaning

A pre-Islamic Arab's capacity to dispose of his property by will was as full as his power to deal with it by acts inter vivos. He was free to make will in favour of any one he chose, and there was nothing to prevent him from giving away his entire property to some rich stranger, leaving his own children, parents and kindred in want. He was also at liberty to give preference to one heir to the exclusion of others.[4]

After the advent of Islam, when Koran laid down specific rules for the distribution of' inheritance, it was thought undesirable to allow him to tamper with the course of devolution of property through unrestricted rights of making wills. Islam placed a restriction on the testator's power, so that he was not allowed to bequeath more than one-third of the estate.

This limit of one-third is not laid down in Koran, but it is based on the following tradition *" Sa'd ibn Abi Waqqas said: I was ill in the year of the conquests of Mecca, and was near dying, and the Prophet came to see me, and I said: `Oh Messenger of God, verily I have much property, and no heir except my daughter, may I then make a will, leaving all my wealth for religious and charitable purposes?' He said, `No'. I said, `May I do so with 2/3rd of it'?' He said, `No.' I said, `Shall I with 1/2 of it?' He said, `No.' I said, `May I with 1/3rd of it?' His Highness said, `Make a will disposing of I/3rd in that manner; for 1/3rd is a great deal, particularly of this great wealth which you possess, for verily if you die and leave your heirs rich, it is better than leaving them poor to beg; for verily the money which you expend for God's pleasure, you will be rewarded for, even to the mouthful which you lift up to your wife's mouth."*[5]

Another version of the same Tradition runs as follows:

"Sa'd ibn Abi Waqqas said: `His Highness came to see me when I was sick, and said, `Have you made your will leaving anything to be expended in the way of God, and for charitable purposes?' I said, `Yes, I intended to do so'. He said, `In what proportion of your wealth have you intended so doing?' I said, `All my wealth is for the road of God'.

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[4] Abdur Rahim, I5.

[5] Miscitat-ul-Masabih, XII, x.x. I.

The Prophet of God said, `Then what have you left your children?' I said, `There is no necessity for my leaving anything to them, for they are rich.' His Majesty said, ' make your will leaving 1/10 th in the road of god'. And I continued repeating my desire to leave more, till at last the Prophet said, ' then make your will leaving one-third of the property for this purpose and that's a great deal."

Form of will

It may be made orally or in writing. Convenience, however, demands that it should be in writing. If the will is in writing it need not be signed and if signed it need not be attested. The only requisite is that the intention of the testator should be clear; thus a dumb person, or a person who is unable to speak due to illness, may make valid wills through gesture. For an instance, a sick man is unable to speak from weakness. Another person addresses him and says, " do you want to give your one-third property to Z" if the sick person gives a clear nod with his head then the will is complete.

If the intention is clearly expressed, a will takes effect as a will even if it is described as *tamliknama,* or is in any other form. The term *tamlik* is one of general import and may be applied to gift, to sale or to a will. Where a man leaves one testamentary writing or several testamentary document in the nature of instruction by the deceased to his legal advisors or to his relative as to the instructions by the deceased to his legal advisors as to the deposition of his property would operate as a valid will and may be admitted to probate. But if the intention is not clear, it will not take effect as a will. But a document with following words, " I have no son, and I have adopted my nephew to succeed to my property and title." Was held not to constitute a will. The onus of establishing an oral will is always very heavy; it must be proved with utmost precision, the contents and intention must be implicit from the circumstances. So the formalities are not material, the essentials are: -

(1) The testator must be competent
(2) The *bona fide* intention must be clearly expressed
(3) It must be intended to operate after his death
(4) The quantitative limits of the property must be observed

(5) The qualitative requisites of the subject matter of the will – the property- are satisfied; and
(6) The legatee must be competent to take the benefit.

Who can make wills

A Muslim who is of sound mind and is major can make a will. Although according to Muslim law majority is dependant upon the age of puberty, which is supposed to be reached at 15 years of age, yet the Indian Majority Act recognize only the age of 18 years as a requisite for the purpose of will.
But if a guardian of his person or property has been appointed by court or his property has come in charge of the court of wards, he will attain majority on completion of 21 years of age.

Apostasy: -

According to Hanafi school, apostasy does not invalidate a will if it otherwise lawful. A will by a female apostate is lawful according to the se ct to which she is apostatizes. However all these customary rules are otiose after the coming into force of the caste disability removal act 1850 under which apostasy is no more disqualification.

Unsound mind

If a will is made by an insane person, it would remain void even if he subsequently recovers and remains sane till death. Conversely a will made by a person of sound mind becomes void if subsequently he becomes insane and remains so till death. A will by an insane made during lucid interval shall remain valid only if the insanity does not last longer than 6 months.

Insolvency

Debts have priority over legacy. If the testator is in debt to the full amount of his property, the bequest would not be lawful unless the creditors relinquish their claims.

A person condemned to death may also make a will.

A *purdanasheen* lady is also competent to make a will. The court would scrutinize more carefully the element of free consent in such a case.

A will by a person under coercion, undue influence or fraud is disallowed.

A will made by a person after he has taken poison or has done any other act towards the commission of suicide, is not valid. The Shia law, however says, that if the person made the will and then committed suicide, the bequest would be valid.

A minor may make a will, but its validity would be postponed to the event when after attaining majority, he ratifies it. Such a will is very weak, as it is open to attacks on the grounds that it has been made under force, coercion or undue influence.

The law of onus

The person who propounds a will (i.e., Claims the existence of a valid will.) is under greater obligation to prove by clear evidence that the will was executed by the testator and at the execution he was a free agent and possessed a sound and disposing state of mind. However, in the case of a settlement as well as a will, so long as the execution of the document is proved, the onus is on the person who asserts the document had been obtained by undue influence. In case other than the will, at any rate the person who alleges, has to prove that the expectant did not have the mental capacity to comprehend the nature of the transaction.

Subject of the will

It is not necessary that the property bequeathed by will must be in existence at the time of the making of the will. It may, or may not be; but it must be so at the time of the death of the testator; for, the will takes effect from the point of the difference between a will and a gift.

Anything, movable or immovable, over which the right of property may be exercised or which may form the subject of exchange or barter, or a fractional share thereof, or the usufruct of a thing, may be lawfully disposed of by will. A bequest remains valid and operative, though subsequent to the making of the will the testator makes any changes or improvements over the property subject to such changes as imply a revocation by the testator. Thus, in a case wherein A bequeaths a house to B by will, and later modernized the house B will get the improved house, A gives a plot to B and later builds a house on it then B will get the land but the house would go to his heirs. But if A bequeaths the house to B and later pulls it down B gets nothing.

The subject matter of the will may be

(1) The corpus of a property, which must be in existence at the time of the testators death, and could be non-existing at the time of making the will;
(2) The usufruct of an existing property for a limited time or for lifetime of the legatee. The position of the legatee is the same as that of a beneficiary under a *wakf.* It is permissible to give the corpus to one person and the usufruct to another.
(3) The vested reminder. Suppose A bequeaths the usufruct to B to his lifetime and then to C, Chas vested reminder in the property.

In the case of *Amjad Khan v. Ashraf Khan*[6] wherein the case was considered was based on the fact that can the testator by the way of will grant life interest to one and then the whole of the interest to another it was affirmed that the intention of the testator should be considered while handing over the property and the will was held to be perfectly valid. As a result of this decision the High Courts (of Bombay, Oudh, Nagpur and Calcutta) helds that the grant of life interest were valid both by the way of gift as well as a will and the same would not enlarge as an absolute ownership.

The bequest which can be done by a Muslim cannot bequest more one-third of the property including all the estate. This one-third is calculated after deducting any debts, and funeral expenses.

[6] AIR 1929 PC 149.

For an instance if A dies leaving Rs. 10,500. His funeral costs Rs. 500 and his debts amount to Rs. 1000; the balance is Rs. 9000. Hence the bequeath able third amounts to Rs. 3000, and A cannot dispose of more that this amount.

But suppose if A bequeaths Rs. 4000, then the bequest would not take effect unless the heirs of A give their consent, after the death of A (under Hanafi law) or before or after the death of A (under Shia law).

Abatement of legacies

The requisite of this particular section arises only when the property, which has been transferred, by the way of will has exceeded more than the prescribed limit i.e. Which is more that one-third property at such a situation other heirs need to give consent to such a will of the testator.[7]

But if the heirs do not give consent, the Hanafi law provides that the bequest be ratably reduced or abated. The principle is called the "abatement of legacies". The *Ithna Ashari* (Shia) law, however, does not recognize the principle of " abatement of legacies". Shia law says that if several bequests were made through a will, priority would be determined by the order in which they are mentioned.[8] The first bequest, takes affect first and thereafter the subsequent bequest, unless the bequeathable third is exhausted. For example, a testator leaves 1/12 of his estate to A, 1/ 4 to B and 1/6 to C and the heirs refuse their consent to these bequest, then A would get 1/12 B would get his share of 1/ 4, but C who is mentioned would get noting as the 1/3 property has already been exhausted between A and B. there is however an exception to this particular rule that if in the above example A and B are both given 1/3 each the later bequests prevails; so B will have preference over A who will get nothing.[9]

If the bequest are for religious or pious purpose but exceed the legal limit of one-third then, the priority would determined in the following order:

(a) Bequest for *faraiz* (i.e., those duties which are expressly ordered in Koran, fro instance, performance of Haj)

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[7] Fyzee, A.A.A., *Outlines of Muhammadan Law,*276 (Oxford university press, 4th edn.)
[8] ibid
[9] www.al-islam.org/jurisprudence/2.htm as visited on 14/10/2003.

(b) Bequest for *waqjibat* (i.e., those acts that are recommended by Koran, but not obligatory, for instance, charity on day of breaking of fast); and

(c) Bequest for *nawafil* (i.e., voluntary but pious acts which are not even are recommended, for instance, building a bridge or an inn)

Bequest of the first class takes precedence over that of the second and the third.

Preparation of the Will

For the proportions set out by the Koran to be appreciated one must put his financial matters straight. For example there was a person running a little business from which he was maintaining his whole family. He grew old and his eldest son came into the business at a young age. Gradually his brothers also came into the business. The sons worked hard and expanded the business greatly building up an empire.[10] One brother, for example, became a doctor. All his expenses for studies came from the business. Another brother became a lawyer. All his expenses also came from the business. Though the sons who came into the business built the whole empire in respect and honor of the father, they left everything in his name. One of the sons suggested that everyone must be given his share or a proper salary be fixed for everyone. He is told: "It all belongs to you." Why do you want to take a salary? Just carry on taking your allowance. Everything is hushed up. The father keeps on signing all cheques, etc, allocates money to the brothers for building houses, to buy cars, to go for haj, etc. The sisters eventually get married and settle in wealthy homes. Everything is rosy. The father passes away. Since everything belonged to the father till the time of his death, the daughters get their full shares, as well as the doctor and lawyer, who have not contributed in the building of the empire but have already in fact collected so much on the occasions of their weddings and studies. The sons who built up the empire feel very hurt in that they are receiving a very raw deal. They never collected a salary. They only obtained their requirements from the business and a meager allowance. They slogged for the business for years and years. The sister,

[10] www.barkati.net/qanoon/qanoon/5.htm as visited on 15/10/2003.

the doctor and lawyer are getting their full share, like those who worked so hard, without working at all.[11]

Respect and honor of the father is compulsory but *hisaab kitaab* (accounts of financial dealings) must be put right. This is the foundation for lasting love and support in the family. The above example illustrates what bitterness and hatred is created by not sorting out things Islamically. We still live with an "Indian" (or any other) mentality and feel that it is a norm of our social structure to live together and share everything - a "communist" type of life and regard it as unity and Islamic. If anyone wants to put things right or even just suggest it, he is regarded as trying to break up the home or unity. The father and the rest of the family become very suspicious of him, they will accuse his in-laws of "putting him up" to take his share so that their daughter can "live it up", etc.[12]

Another example is where a husband and wife work together in a business. Firstly, it is totally wrong and against Islam to expose a woman in this manner. Secondly it is morally against the physical nature of a woman. She is meant to be a queen and enjoy the comforts and security of her home, no matter how humble they may be. She is meant to be a mother, a wife, a housewife - how can this be possible when she is away from her home and children? By exposing her physically and by exposing her feminine nature she loses all her feminity. Thirdly, and this is of relevance to our subject, she is used as a manageress in the business, a sales lady, a supervisor, she has to do the banking, driving, sometimes accounting. Together with all this she must maintain her home spotlessly, cook the best food and be on time with it, she must be the best mother and most responsive wife. Perhaps this is exaggerated a bit, perhaps not. Sometimes all this is expected of her and even more, sometimes less. What does she get for all this? Hardly peanuts! She dare be late with the food one time! Or the salt be less or the food burnt a bit, or the house or children are not clean to the satisfaction of the "boss", or they have been up to mischief and see the man coming down upon her, stopping at no limits abusing her verbally and even physically. This type of attitude gives Islam and Muslims a bad name.[13]

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[11] Ibid

[12] www.al-shia.com/html/eng/books/history/origins-development-shia-islam/3.htm as visited on 14/10/2003.

[13] See F.N 7

If the husband had to employ people for all these jobs, how much should he have to pay? So why does he not compensate her for what she is doing. A person said there must be teamwork in building the business. I said then there must be teamwork in sharing the profits as well. All the profits are kept by the husband and she gets one-eight of it on his demise. She gets a raw deal - not by Islam, but by her unfair husband who used her for his material gain and never thought of paying her for her services. He worries of securing her when he is no more and feels that her one-eight share is too little, but he does not think of remunerating her for her services in his lifetime. After all it is her benevolence and kindness and norms of our society that she cooks for her husband, maintains his house and brings up his children. Are we or the enemies of Islam oppressing our women?

Ownership of household goods "personal belongings" etc, must be specified. A newly married couple usually receives presents of household items. These are then used "commonly" in the home. Who received what and what belongs to whom is surely forgotten. Eventually in the case of death, the distribution of the estate becomes difficult because it is not known exactly what belongs to the deceased. Maulana Thanwi (RA) used to say that if I brought a teaspoon into the house, I would say clearly to whom it belongs. The household items a wife brings to the husband's home could perhaps be bought over by him at a reasonable price and he could pay for it over a period of time. If she wishes she could give them to him of her own free will. This is suggested in order to keep track of what belongs to whom, because eventually it becomes practically impossible to ascertain what belongs to whom. Certain items may still belong specifically to the wife, like a sewing machine, knitting machine etc. which was given to her or she bought, or her husband gave it to her.[14]

Another venture which we must correct, though not directly related to this subject is partnership business between brothers or the larger family. Generally one-person controls and only he knows the financial matter of the partnership. There are no annual financial statements given to anyone. Nobody's share is given. If a brother has to leave the partnership or dies, he is not paid out. His family maybe maintained but they never know or receive their true share. If anyone asks for his share or an account of matters he is

[14] Ibid

made to look like the evil one and is discarded in the name of religion! What a topsy-turvy world! What a change of Islamic values and lifestyle!

These are just a few examples of things we must correct to appreciate and understand the share set out by the Koran for the heirs. Allah has already made our will. Let us now turn to the actual making of the will. But just before that let us understand that Allah is the sole inheritor of all things in the skies and on the earth because "All things belong solely to Allah". Thus when nothing belongs to us what will are we going to make? We are mere custodians and trustees of an *amanat* (trust), which Allah has put, in our care for a little while. We cannot disown one son or daughter and give another more. Allah himself has fixed the shares of the immediate family and heirs. Before the share of heirs was revealed by Allah, it was compulsory to make a will and stipulate each one's shares.[15]

Aus bin Thaabit (RA) passed away leaving his wife, two daughters and a minor son. According to a previous Arab custom, two male nephews came and took all the possessions of their deceased uncle. The wife of Aus bin Thaabit (RA) said that since you are taking all the property, and then at least marry these two girls so that I could be relieved of their maintenance. They refused. In her distress she came to Rasulullah salllahu alaihi wasallam) and complained. May we give our lives for Allah and the Koran and His Rasul salllahu alaihi wasallam. Allah revealed the aayats in the Koran defining every rightful heir's share. Consequently Rasulullah salllahu alaihi wasallam called for all the property and divided it between the wife and her children. The wife received one-eight and in the remainder, the son received double of what each daughter received i.e. the remaining was divided into four parts - the son received two parts and the daughters one part each.

Thus Allah has defined every rightful heir's share. So the will that we have to make is not to define the shares of the inheritors and who they will be, that is already done by Allah.

Let us first look at the importance and virtues of making a will and warnings of not making one.

Importance of Making a Will

[15] www.dartabligh.org/books/ebooks/madrasa/book4/book4.pdf as visaited on 14/10/2003.

"It is not right for a Muslim that two nights, and in one narration, three nights pass on him, but that his will be written, if he has something to make a will for."
His rightful heirs and their proportions have been fixed already by Allah. The financial rights of others, which he is holding, or his financial rights, which others are holding, must be recorded. His debtors and creditors must be listed clearly and even what he owes to Allah. This hadith also teaches us that we must make our will and update it regularly. Whenever any changes come about in our matters, we must note it.[16]

The Virtues of Making a Will

"He who dies on his *wasiyat* (having made a will) dies on a (clear) path (i.e a clear path, leaving no disputes or unresolved issues for his family and making the distribution of the estate easy), he dies on *sunnat*, on the fear of Allah, martyrdom and he dies forgiven.
Subhanallah! What great virtues for making and keeping one's will ready. Five great boons are promised:

1. He dies on a clear path, how nice to depart, leaving no disputes behind.
2. On sunnat - could there be something greater to ask for.
3. He dies on *taqwa* - On *taqwa* Allah promises a way out from every difficulty. What greater difficulty can there be than death. By having one's will ready, one is promised freedom from this difficulty.
4. And on *Shahaadat* - Rasulullah (Salllahu alaihi Wasallam) constantly desired to return to the dunia to become a shaheed (martyr) again and again. Sayyedina Umar (RA) made dua for shahaadat. By having made a will, a person acquires this great stage. Or "on shahaadat" means dying having given evidence of all his financial matters.
5. And he dies forgiven - To die free of sin ensures direct entry into jannat.

The Purpose of Making a Will

[16] Ibid

In Islam a will is not made to give whom one wants how much, or not to give one or to give less to whom one wants to. It is narrated in a hadith:
"Allah has given every rightful person his right, so there is no wasiyat for him."
All those who are going to inherit, and how much, is defined by Allah. This is an intricate subject on its own known, as "Illmul Faraaidh" and experts in this field will inform one of the details as and when required.

Wills or bequest[s] or *Wasiyat* derive their authority and sanctity from the sacred texts of the Koran.
"It is prescribed to you when death approaches any one of you and that he is to leave any wealth behind, he should bequeath equitably to his parents and kindred." (Q. 2: 130)
"*And such of you as feel the approach of death and are to die and leave wives behind shall bequeath for their wives a year's maintenance without requiring them to quit their homes.*" (Q. 2: 240)
There are a number of precepts of the Prophet on this subject. The arguments advanced by the learned doctors in support of [this] bequest are that there is an indispensable necessity that man should have the power of making bequests for, man from the delusion of his hopes, is improvident and deficient in practice, but when mortal sickness invades him, he gets alarmed at that time; therefore, he stands in need of compensate[ion] for his deficiencies by means of his property -- and this in such manner that if he should die of the illness, his object, namely, compensation for his deficiencies and merit in a future state, may be obtained, but if he were to recover, the property will still be his.[17]
Wasiyat means the act of conferring a right in the substance or the usufruct [**the legal right of using and enjoying the fruits or profits of something belonging to anothe**r] of a thing after death. It may be constituted by the use of any expression that sufficiently indicates the intention of the testator. If it is apparent that the intention of the testator is to make a disposition operative on his death, it will be regarded as a Wasiyat.
Wasiyat may be of anything useful thereof. It is not necessary that it should be mentioned by the testator that it would come into effect after his death. This is legally implied.
According to Hanafi School, there are two ingredients of a *Wasiyat.*

[17] ibid

- One is the disposition by the testator and
- The second is its acceptance by the legatee.

This will arise only after the death of the testator. According to some jurists, acceptance is not an essential ingredient for the act is to come into effect after the death of the testator.

The Muhammadan Law does not insist that a Will should be in writing, and a nuncupative [**not written oral instead**] will, if forced, is as valid as a testamentary disposition in writing.

A letter written by the testator containing direction[s] as to the disposition of his property to take effect after his death has been held to constitute a valid will.

A Will can be made by signs [if] a person cannot speak because of a mortal illness or is dumb, but can express his meanings by sign[s].

A *Wasiyat* may be conditional or contingent but when the contingency envisaged does not arise, the contingent will not be given effect to.

Capacity to make a Will

The testator must be:

(i) In the full possession of his senses at the time. A will made by an insane person is not valid. If he makes it at a time when he was in full senses but again relapses to insanity and that condition lasts for at least six months, the bequest will become invalid, otherwise not.

(ii) He most be [of the age of] major [ity].

(iii) He must not be indebted to an extent that his debt is equivalent in value to his whole property.

(iv) He must not be acting under compulsion or under influence or in jest.

(v) He must be a free person.

Objects in whose favour a Will can be made

A bequest can be only to the extent of a third of the testator’s property but not to any further extent.

A bequest to any amount exceeding [a] third of the testator's property is not valid. In proof of this is the *Hadith* as reported by Abu Wakas:

"In the year of the Conquest of Mecca, being taken so seriously ill that my life was despaired of, the Prophet of God came to pay me a visit of consolation. I told him that by the blessing of God [I had] a great estate but no heir except a daughter, I wish[ed] to know if I might dispose of it all by will. He replied, 'No' and when I went on asking if I might bequest two-thirds or one-half' he replied again in the negative, but when I asked," If I do so to the extent of one-third, he answered, 'Yes, you can bequeath one-third of your property by will, and a third part to be disposed of by will is a great portion; and it is better that you should leave your heirs affluent than in a state of poverty which might oblige them to beg of others."

In the case of heirs consenting to it, a bequest of more than one-third of the property, which by itself is not valid, becomes valid. According to all schools of Muhammadan Law, a bequest to any one of the heirs is not valid without the consent of the others. The Prophet had said, "**God has allotted to every heir his particular right. And that a bequest to particular heirs is unjust**." Under [the] *Shariat* it is advisable not to make [a] bequest if the heirs be poor and the particular portions to which they are entitled in inheritance are not going to enrich them. God has said in the Koran, "*The exertion of generosity towards relations [is] more laudable than towards strangers*."

Whether the person in whose favour the Will is made is an heir or not, must be determined not at the time of the Will but at the testator's death.

Where the Will is in favour of non-heirs or for a pious or charitable purpose, it is valid and operative only in respect of one-third of the testator's estate without the assent of the heirs and in respect of more then one-third with their consent.

A grandson whose father has died in the lifetime of the testator is a non-heir when he co-exists with another son of the grandfather; and a bequest to him not exceeding one-third of the property is valid. The consent may be given expressly, or indicated by unequivocal conduct such as signing the 'Will' with a full understanding of its meaning without outside pressure or influence or allowing the legatee to enter into possession without objection.

Where a Will to a non-heir exceeds one-third of the testator's estate and some of the heirs consent whilst others do not, the excess will come out of the shares of the consenting heirs.

In order to be entitled to the bequest, the legatee or legatees must be either actually or presumptuously in existence at the time of the testator's death.

A bequest to a person not yet in existence at the testator's death is void, but a bequest may be made to a child in the womb, provided it is born within six months from the date of the Will. Like a gift, a bequest may be made by a Muslim in favour of a non-Muslim and vice versa.

A bequest to a person from whom the testator receives a mortal wound is invalid, whether the murderer be one of heirs, or a stranger or whether he may have wounded him willfully or by misadventure, provided he be the actual perpetrator of the deed. This is in accordance with a Tradition: "**There is no legacy for a murderer**." He deprives himself of the benefit of [the] Will just as a man in similar circumstances is excluded from [an] inheritance. If a legatee slays his testator, the bequest in his favour becomes void.

Usufructuary Wills

If a person bequeaths the use of his house either for a definite or indefinite period, such [a] bequest is valid. In that case the house will be consigned to him if it does not exceed one-third of the property of the testator. This is not lawful for the usufructuary legatee [**the one having the use or enjoyment of something to whom a legacy is bequeathed**] to let it out on hire. If the bequest is for a limited term and the legatee dies before the expiration of the limited term, the article bequeathed in usufruct immediately reverts to the heirs of the testator. In a bequest of the use of an article to one and the substance of it to another, the legatee of usufruct is exclusively entitled to the use during his term. A bequest of the fruit of a garden implies the present fruits only, unless it is expressed in perpetuity.

Lapse of [a] Legacy

If the legatee does not survive the testator, the legacy will lapse and form a part of the estate of the testator.

Wills made during maraz-ul-maut

A gift without consideration made in maraz-ul-maut (death illness) takes effect as a will. Under Hanafi law, it takes effect to the extent of bequethable third, if it is not in the favour of the heirs, provided possession is transferred.

To constitute a maraz-ul-maut there are certain essentials as under: -

1. Proximate danger of death
2. Apprehension in the mind of the sick
3. Some external indicia, such as inability to attend regular work

But nothing is conclusive and is mostly dependent on the question of fact.

Reasons for limitations on the testamentary power

As said above, there are two limits on a Muslim's power to bequeath one, as to persons- he cannot bequeath to an heir, and two, as to property he cannot bequeath more than one-third of his property. [For exceptions, see infra.] The reason for this rule is the policy of the Muhammadan Law, viz., to prevent a testator from interfering by will with the course of devolution of property among his heirs according to law. It safeguards against a breach of the ties of the kindred, practice of favoritism and prejudice, and violation of the Koranic principles of inheritance. The object also includes the concern to see that no heir is left destitute.

The ban against bequest to stranger (i.e. a non-heir) in excess of one-third is subject to following exceptions, that is, may be relaxed in the following cases:

1. Where, subject to the provisions of any law for the time being in force, such excess is permitted by a valid custom;
2. Where there are no heirs of the testator;
3. Where the heirs existing at the time of the testator's death, consent to such bequest after his death; ,
4. Where the only heir is the husband or the wife and the bequest of such excess does not attach his or her share. To illustrate this:

   (i) A bequeaths his entire property to a stranger and dies leaving his widow as his only heir. The widow does not consent. The will is valid to the extent of five-sixth (i.e. in excess of one-third). Because-The bequest is valid up to

1/3rd without her consent. Out of the remaining 2/3rd, she is entitled to inherit 1/4th, i.e. 1/6th of the whole. Therefore, the will is effective upto 5/6th.

(ii) A bequeaths her entire property to a stranger and dies leaving her husband as her only heir. The husband does not consent. The will is valid upto 2/3rd. Because-The will is valid to the extent of 1/3rd. The husband inherits half the 2/3rd (i.e. 1/3rd of the whole) as heir. The will is valid to the extent of 2/3rd.

The share of the husband or wife is not affected in the above cases and the will is valid in respect of more than one-third of the property.

Revocation

A Will is revocable. It may be revoked at any time even during the last illness of the testator. The revocation may be either express or implied. It is express when the testator revokes it in express terms. It is implied when the testator indicates by his conduct or subsequent acts that he does not intend to maintain the legacy like [an] addition to the subject of the bequest or extinction of the proprietary right of the testator.

Mere denial of [a] bequest does not amount to its retraction. If a testator denies a bequest and the legatee produces [a] witness in proof thereof, the bequest will be established. If a testator declares the Will he has made in favour of a particular person to be unlawful and usurious, this is not [a] retraction because its description as illegal or usurious is a plain proof that it exists, and until the testator annuls it, it will hold good.

If a testator should desire that [the] execution of his Will after his death may be suspended for some time, it is not revocation.

A bequest to one person is annulled by a subsequent bequest of the same thing to another person. But a will is not revoked by the marriage of the testator subsequent to its execution.

Executor

The testator may appoint any person to carry out the directions of the testator. He is called the executor. He may be a man or woman, a stranger, or a relative. The appointment may be for a specific purpose or may be general. If a testamentary

disposition is invalid, the appointment of the executor would remain valid so far as the guardianship of minor children and their education are concerned.

It is the duty of the executor to pay the funeral expenses, the debts and the legacies, and to administer the estate generally. He is empowered to collect [the] debts and other dues to the estate. [The] appointment to the office of an executor cannot be made without his consent but [once] an executor has accepted the office, he can neither resign nor be removed by [a] court without sufficient cause. The executor can bequeath his office to another. If more than one executor has been appointed, all must act jointly and if the office of one of them becomes vacant, the court will appoint a competent person in his place.

The acts of one executor will not be void in the following cases viz., in payment of funeral expenses, in the purchase of necessaries for the children of the testator, in the acceptance of gifts made to the testator, in returning deposits with the testator, in payment of specified legacies and in the litigation of the rights of the testator.

If no executor has been appointed by the testator, the Court must appoint someone to give effect to the Will.

The powers of the Executor

A Mohammedan executor is not bound to take out [a] probate of the will under the Probate and Administration Act IV of 1881 in order to enable him to act. The Muhammadan Law gives him sufficient powers.

A critique of the one-third rule

As is well known, a Muslim testator may not make bequests, which, in aggregate, exceed one-third of his net estate unless, at least, heirs consent thereto after his death (or, in the Shia view, also during his lifetime). This is in most cases eminently reasonable. But a Sunni Muslim is also precluded from making any bequest whatever to one who is entitled to a share in his estate as an heir unless, again, the other heirs' consent thereto after his death. This rule is intended to prevent him from altering in any way the division of his estate between different heirs, as prescribed under the law of inheritance. Again,

moreover, this is perfectly reasonable as a general rule; but circumstances often arise in which there may be excellent reasons for making special provision for a disabled child, for example, one who has been deprived of the educational or financial opportunities enjoyed by the other members of the family. The Shia law has always allowed this; and such freedom of bequest, within the bequeathable third, would seem to be the natural implication of some of the verses of inheritance in the Koran. So, recent reforms in Egypt,37 the Sudan38 and Iraq3~ have made this lawful for all Muslims. It is obvious, moreover, how much the relaxation of the rule previously accepted by Sunnis in this matter would benefit widows since their husbands could then leave them a bequest to augment their pitiably inadequate share on intestacy.

For whom the bequest can be made

(i) Any person who is capable of holding property, whether male or female, Muslim or non-Muslim, may validly avail the benefit of a bequest.

(ii) Unborn person cannot be a legatee. However, if the legatee is in the womb and the birth takes place within six months from the date of making the will, he can be a lawful legatee. Shia law recognizes a legatee born within 10 months from the date of will.

(iii) Heirs cannot be the legatees, that is, no bequest to heirs, who are entitled to inherit. This rule is relaxed only in cases, where other heirs give their consent (after testator's death, in Hanafi law; before or after testator's death in Shia law). By giving consent, an heir can bind only his share but not of others.

It is essential that the heir must be in existence at the time of testator’s death.

Consent may be inferred from the conduct of heirs.

Comparison of Sunni law and Shia law.

Sunni law	Shia law
Suicide – bequest by one who commits the act for suicide before or after making the will is valid (the act means taking poison ect.)	Bequest is valid only if the act for committing suicide was done after making the will.
Child in the womb – bequest for an unborn person is valid if the child is born within 6 months of the making of the will.	Valid if the child is born within 10 months of the making of the will.
Consent of the heirs (a) For the bequest in favour of stranger up to 1/3 property- not required (b) For bequest in favour of heir (even 1/3) consent to the other heirs required	(a) Same (b) For bequest in favour of heirs (1/3) consent not required. For more than 1/3 consent must
Consent of the legatee presumed if he dies before consenting	No presumption, consent must be obtained
Time of consent -after the death of the testator. Consent before not sufficient	Before or after death both are sufficient
Bequest in case wherein the death of the testator is caused is not valid in any case both intentional as well as unintentional are considered	Only in case of intentional casing of death the will ceases to be valid
Pious bequest- priority in order first *Farz,* second *Wajibaat* and finally *Nawafil*	First priority to *Farz* for others principle of proportionate abatement is considered.

Conclusion

The testamatory will or wasiyat which has enabled an individual to make a will has its background as already stated from the holy Koran and its usage the restriction has been well explained as the requirements of the fulfillment of the inheritance of the Koranic heirs but when we see the aspect wherein an individual can gift his entire estate to any person with full rights and nothing can be done to prevent such a transfer and is to be held to be perfectly valid even in the context of Koran as the differentiating aspect is that though an individual has full right to his property during his life time and can do anything with the property thought his life but it is considered that he has only restricted right to alienate when he wants to transfer the property after his death as the restrictions have been derived from the Koran and the restriction on the aspect as the Koranic heirs of the deseased have to be considered as the major aspect as it is explicitly mentioned about the devolution the property of any person who dies with property then the property should devolve in the particular order and no person can do anything that can be voilative to Koran and the right to alienate one-thierd property by a testamatory will or wasiyat is a kind of liverage whch has been given to the individual by the prophet and this levirage cannot be converted to a full right of transferring the full property, and the transfer of the property wholly is not possible by any kind of will or wasiyat .

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